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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 556.

MARY B. CURLEY, *Petitioner,*

v.

HARRY PAUL CURLEY, *Respondent.*

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 5056.

MARY B. CURLEY, *Petitioner,*

v.

HARRY PAUL CURLEY, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION.

OPINION BELOW.

The opinion of the United States Court of Appeals for the District of Columbia was rendered on June 2, 1941 and is reported in 120 F. (2d) 730.

JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia is sought to be reversed in this proceeding under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936, 28 U. S. C. sec. 347 (a).

STATEMENT OF CASE.

Petitioner and respondent were married at Elkton, Maryland on September 18, 1915. (R. 10) Respondent was and is an officer in the United States Navy and from the time of his marriage to the petitioner until the separation of the parties in 1929, they lived together at various places where respondent was assigned in the course of his military duties, except for intervals of actual separation. Since the last separation in 1929 petitioner and respondent have not lived or cohabited with each other at any time. (R. 10)

On January 28, 1930, shortly after the parties finally separated, the respondent filed a complaint for absolute divorce against the petitioner in the Court of Common Pleas in the City of Philadelphia, Pennsylvania. In that proceeding, the Master in Chancery recommended that "a divorce be granted but thereafter on February 5, 1935 the bill of complaint in said cause was dismissed by said court." (R. 10)

Respondent thereafter moved to Florida and became a legal resident of Florida and on May 7, 1937 filed suit in that state for divorce against the petitioner. (R. 11) Service of process in the Florida proceeding was obtained by publication and a copy was received by the petitioner by mail. Petitioner also obtained a copy of the complaint from the Clerk's Office of the Florida court, through her attorney, although she did not appear in that proceeding. (R. 11) Respondent testified in the Florida proceeding that he had been a bona fide resident of the State of Florida for the period required by the laws of that state. (See Respondent's (Defendant's) Exhibit No. 1, Page 16). The ground upon which respondent sought a divorce in the Florida proceeding was cruelty. Testimony relating thereto was adduced from the respondent and other witnesses. (Respondent's (Defendant's) Exhibit No. 1) On July 3, 1937, the Circuit Court for the Eleventh Judicial Circuit for the State of Florida signed a decree granting an absolute divorce to the respondent. (R. 11) The record shows that respondent, at that time, was a bona fide, legal resident of that

state as was evidenced by his residence therein, his intention to remain therein, and by other circumstances, including his membership in the Key West Chamber of Commerce, his registration as a voter in Monroe County, Florida, and the fact that his Federal income tax return in 1937 was filed by him in Florida.

After respondent was awarded the decree of divorce in Florida in July 1937, petitioner filed suit in the District Court of the United States for the District of Columbia against the respondent in November 1937, seeking to require the respondent to maintain and support her, (under Section 75, Title 14, Code of Laws for the District of Columbia (1929), Act of March 3, 1901, 31 Stat. 1346, c. 854, sec. 980) predicating her action upon the alleged invalidity of the Florida divorce. (R. 3) In petitioner's complaint, she averred that she was a resident of Pennsylvania but did not aver the citizenship of the respondent, except to state that he was an officer in the United States Navy and that he "resides in the District of Columbia." (R. 2) She further averred that the respondent had never established a bona fide residence or domicile in the State of Florida, that he had perpetrated a fraud upon the courts of that state in simulating a residence and domicile therein and that the courts of Florida therefore never had jurisdiction of the marital status and that the decree of that state was therefore a nullity. (R. 2, 3) In his answer to this suit, respondent denied that he resided in the District of Columbia and affirmatively averred that he was and had been since January 1937 domiciled in and a bona fide resident of the State of Florida and that he was only temporarily in the District of Columbia on a visit to relatives at the time he was served with process. (R. 4) Respondent further set forth in his answer that the courts of Florida did have jurisdiction of his suit in that state and that the decree of divorce entered in Florida was entitled to full faith and credit in the District of Columbia. Respondent further averred that neither he nor the petitioner were or had

been residents of the District of Columbia. (R. 6) Finding of Fact No. 10 in the court below was as follows (R. 12):

> "That neither plaintiff nor defendant were at the time of filing of this complaint or since domiciled in or residents of the District of Columbia."

However, the District Court held that the matrimonial domicile of the parties was and, ever since their marriage, had been Pennsylvania and, therefore, refused to give full faith and credit to the Florida decree or to recognize it on grounds of comity. It held that the decree was obtained by fraud and was void although there was no evidence to support that conclusion; that petitioner and respondent were still husband and wife; and that the courts of the District of Columbia had jurisdiction to award maintenance, notwithstanding that neither party was a resident of the District of Columbia. (R. 12, 13) Accordingly, judgment for maintenance and counsel fees was entered in the District Court in favor of the petitioner. (R. 13, 14)

Respondent appealed from the judgment of the District Court to the United States Court of Appeals for the District of Columbia where the judgment was reversed. (R. 21)

THE OPINION OF THE COURT OF APPEALS.

The opinion of the United States Court of Appeals for the District of Columbia, reversing the judgment of the District Court, properly held that it was not necessary to decide whether the matrimonial domicile of the parties had been established in Florida, but that it was sufficient to determine whether or not the respondent had himself established a new bona fide domicile of acquisition in that state. Having thus found that the finding of the District Court was unwarranted by the evidence, it was proper to reverse on the ground of the insufficiency of the evidence as to fraud and residence, upon which ground petitioner had sought to attack the validity of the Florida decree. On the contrary, the Court of Appeals held that "the evidence

and the findings clearly show that appellant did establish a new domicile in Florida," and that it was not necessary to determine whether a matrimonial domicile was established in that state. The Court of Appeals further held that whether or not the Florida decree was entitled to full faith and credit, "it may still be recognized on the ground of comity, and there is nothing in the record to prevent the recognition on this ground." The question as to whether or not the courts of the District of Columbia are required to take jurisdiction of a matrimonial dispute between two persons neither of whom is domiciled in the District of Columbia nor residents thereof, particularly as in the present case where there was no showing that the welfare of children, rights of property, or other public interests, were involved, was answered by the Court by holding that it was more consistent with the public policy of the District of Columbia not to interfere with the Florida judgment or attempt to mediate the differences between parties who are non-residents of the District of Columbia and are themselves respectively legal residents of Pennsylvania and Florida.

ARGUMENT.

I. The Decision of the United States Court of Appeals for the District of Columbia Does Not Involve a Question of General Importance.

The real question presented simply involves the sufficiency of the evidence as to the residence and domicile of the respondent, in order to determine whether or not he was a bona fide domiciliary of the State of Florida at the time he was awarded a decree of divorce in that state. The claim of the petitioner was, and the trial court so found, that the evidence was insufficient to establish such domicile or residence in Florida, whereas, the United States Court of Appeals for the District of Columbia, after examining the record, found that "the evidence and the findings clearly show that appellant did establish a new domicile in Florida." The determ-

ination of the question of domicile and legal residence is a mixed question of law and fact. Petitioner does not in her petition challenge that rule. The determination in the case at bar, as indicated by the language of the opinion below, was that on the facts the evidence clearly showed that respondent had established a new domicile. He lived in Florida, he had an intention to remain there, he voted there, and he participated in all the ordinary activities which a person would engage in who is domiciled in the place where he resides. The question, therefore, in the instant case is not a matter of general importance, since the underlying basis of the case involves merely a matter of factual determination. The determination of that fact in this case would not be of any importance in any other case. The determination in this case would not be a formula to be followed in other cases. The determination of the factual basis for the dispute between the parties hereto would be a determination effective and important only as far as the immediate parties hereto are concerned. Determinations of facts and the sufficiency of the evidence upon which those facts are predicated are not subject to review on certiorari.

> *Southern Power Company* v. *North Carolina Public Service Co.*, 263 U. S. 508, 68 L. Ed. 413.

Accordingly, it is submitted that the question decided in the United States Court of Appeals for the District of Columbia below is not one of general importance within the meaning of Rule 38, Paragraph 5(c), of the Rules of this Court.

II. The Decision Below Does Not Involve the Construction or Application of the Constitution or a Statute of the United States Which Requires Settlement by this Court.

Reliance by the petitioner upon a general reference to the Constitution of the United States insofar as the full faith and credit clause is concerned, does not involve a question which has not been settled by this court. On the contrary, petitioner's reliance upon the Constitution seeks an order

which would refuse to give full faith and credit to the judgment of the Florida decree whereas the United States Court of Appeals for the District of Columbia, having found that the decree in Florida was based upon a valid domicile established by the respondent, did recognize that judgment on grounds of comity, without the necessity of predicating recognition on the full faith and credit clause.

The motive which may have prompted the respondent in changing his residence and domicile from Pennsylvania is not material to the question whether a new domicile is established if the new residence is intended as a home for an indefinite period.

> *Williamson* v. *Osenton*, 232 U. S. 619, 58 L. ed. 758,
> *Restatement of Conflict of Laws*, Sec. 22,
> *Goodloe* v. *Hawk*, 72 App. D. C. 287, 113 F. (2d) 753.

The public policy of the District of Columbia is announced by Congress or by the United States Court of Appeals for the District of Columbia. Congress has not acted upon the question of recognition of foreign divorce decrees for the District of Columbia. The United States Court of Appeals for the District of Columbia has frequently acted and has established a firm public policy that all irregular foreign decrees do not require non-recognition.

> *Curry* v. *Curry*, 65 App. D. C. 47, 79 F. (2d) 172;
> *Atkinson* v. *Atkinson*, 65 App. D. C. 241, 82 F. (2d) 847;
> *Hellmuth* v. *Hellmuth*, 69 App. D. C. 64, 98 F. (2d) 431, cert. den. 305 U. S. 597.

Although the fact does not appear in the printed record herein, it does appear in the petition filed by the respondent in the United States Court of Appeals for the District of Columbia on November 20, 1940, that he had since the Florida decree remarried and was living with his wife. And, although the opinion in the case at bar does not make reference to that fact, it is an element which, as in the earlier cases involving comity, may have been considered of

some import and may have been considered by the court below by virtue of its citation of its earlier cases wherein the fact of remarriage was considered as an element.

In *Atkinson* v. *Atkinson, supra,* the husband sought to annul his marriage on the ground that his wife's former husband had obtained a divorce in another state which did not have jurisdiction to dissolve that marriage. The court below gave effect to the foreign divorce in that case on the ground that it did not violate the public policy of the District of Columbia and observed that the parties were of mature age, had lived apart for 11 years when the jurisdiction of the foreign court was invoked, that there did not appear to be any prospect of reconciliation, and that each desired severance of the marriage tie, as the wife had remarried, and that neither party to the foreign decree was attacking it. In the instant case, although a party to the Florida decree is attacking it, the recognition of the decree should not be made to depend on that fact. In other respects, that case is similar to the case at bar. Recognizing the doctrine of comity in *Hellmuth* v. *Hellmuth, supra,* the United States Court of Appeals for the District of Columbia said at Page 65:

> "Even assuming the correctness of appellant's contention that the decree of the Maryland court was not entitled to full faith and credit in the District of Columbia—because Maryland was not the last matrimonial domicil of the parties (Atherton v. Atherton, 181 U. S. 155, 21 S. Ct. 544, 45 L. Ed. 794), and appellant was not subjected to the jurisdiction of the Maryland court by personal service within the state or by voluntary appearance and participation in the suit (Haddock v. Haddock, 201 U. S. 562, 26 S. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1)—it does not follow that the lower court was in error in dismissing the bill. Davis v. Davis, 68 App. D. C. 240, 96 F. 2d 512, decided March 7, 1938, certiorari granted, April 25, 1938, 58 S. Ct. 944, 82 L. Ed. 1523. It is quite proper for the District of Columbia to recognize the decree as a matter of comity, unless considerations of public policy forbid such recognition. Davis v. Davis, supra. In the present case we think the

considerations clearly favor recognition. The purpose of the suit is to destroy appellee's remarriage by declaring the appellant to be still the wife of the appellee. Under the circumstances of the case we believe that it is more in the interest of public policy to validate the remarriage than to set it aside. Atkinson v. Atkinson, 65 App. D. C. 241, 82 F. 2d 847. Appellant and appellee recognized their incompatibility several years ago and entered into a contract for the adjustment of their property rights. Appellee thereafter secured a divorce and remarried. In the present suit, at its inception, appellant asked for a limited decree of divorce; thus both parties have revealed their intention of living apart and that there is no possibility of a resumption of the marital relationship. Moreover, there are no children involved. In fact, there are no substantial considerations of public policy which suggest the desirability of denying recognition to the Maryland decree.

In view of our decision of the foregoing proposition, it is unnecessary to consider the other contentions of the parties."

III. The Decision Below Does Not Fail to Give Proper Effect to Any Applicable Decision of this Court.

Petitioner argues in her brief that the decision in the court below is not consonant with the decision of this court in *Atherton* v. *Atherton*, 181 U. S. 155, 45 L. Ed. 794, and in *Haddock* v. *Haddock*, 201 U. S. 562, 50 L. Ed. 867. Neither of these two cases is authoritative in the case at bar. Each is clearly distinguishable. The *Atherton* case involved a situation where the wife deserted the home of the parties in the state of the domicile of the parties in which state the husband remained and instituted an action for divorce and was awarded an absolute divorce after notice by publication to the wife, who did not appear in response to the notice. This court held in that case that the decree of divorce in Kentucky, the state of the domicile, was entitled to full faith and credit in the courts of New York. The *Atherton* case held that the courts of New York were required to recognize the Kentucky decree. To hold otherwise, this court

there observed, would make it difficult, if not impossible, for the husband to obtain a divorce because of any alleged wrong on the part of the wife, for if he were required to sue her in the state in which she was found, he would thereby admit that she had acquired a separate domicile which would tend to disprove his own ground of action. Although the *Atherton* case does not lend support to petitioner's theory in the case at bar, since it favored the recognition of a foreign decree, it likewise does not support the principle for which petitioner cites it, that is, that the full faith and credit clause requires, as a condition to recognition of a foreign decree of divorce, that it be granted in a state which was the last matrimonial domicile of the parties as distinguished from a state which is the bona fide domicile of the husband. The *Atherton* case does not in any way involve the question of recognition of a foreign decree of divorce obtained in a jurisdiction which was the bona fide domicile of the husband since, in that case, the foreign decree happened to have been awarded in the state which was the last matrimonial domicile—or where they last lived together as man and wife.

Nor does *Haddock* v. *Haddock, supra,* support petitioner's claim. In that case, the husband did acquire a divorce which this court held was not required to have been recognized in a foreign jurisdiction under the full faith and credit clause, for the reason that although the husband established a domicile in the state where he acquired the divorce, the husband himself was the guilty party resulting in the separation between the husband and wife. In such case this court held the new domicile of acquisition could have no jurisdiction to grant a decree of divorce to the wrongdoing party. There was language in the *Haddock* case which tended to indicate that compulsory recognition under the full faith and credit clause required that a divorce be granted in the state of the matrimonial domicile. However, that observation was not decisive in that case because this court has recently indicated, in referring to that case, that

the underlying basis of the *Haddock* decision was that the husband who obtained the decree of divorce in the state where he acquired his own new domicile was the wrongdoer and observed that "there was no suggestion that she was at fault or did anything to disrupt the marital relation." (*Davis* v. *Davis*, 305 U. S. 32, 83 L. Ed. 26) Any doubt concerning interpretation of either the *Atherton* or *Haddock* cases is obviated by the decision of this court in *Davis* v. *Davis, supra*, insofar as may be argued that the earlier cases in this court required matrimonial domicile in the state where the divorce is granted as a condition to its required recognition under the full faith and credit clause. In the *Davis* case, husband and wife were domiciled in the District of Columbia and the husband obtained a limited divorce from his wife in the District of Columbia in which he was required to pay alimony. The husband later moved into the State of Virginia and there established a domicile and obtained a decree of absolute divorce from his wife without the requirement of any payment of alimony and then filed a petition in the original cause in the District of Columbia, setting forth the fact that he had obtained a Virginia decree of absolute divorce and prayed that he be relieved of the incidence of the District of Columbia decree for alimony. His petition was denied and on appeal to the United States Court of Appeals for the District of Columbia the ruling below was affirmed on the ground that the lower court, having entered the decree, retained jurisdiction and that the husband's removal to Virginia did not invest the courts of that state with authority to supersede the jurisdiction of the courts of the District of Columbia theretofore acquired in the case. (61 App. D. C. 48, 57 F. (2d) 414.) The husband later filed another petition in the District Court in which he sought relief from the District of Columbia decree on the ground that he had been awarded a valid absolute decree of divorce in Virginia. After denial of the relief prayed for in this petition, the husband again appealed to the Court of Appeals where it was held that the decision of the lower

court, refusing to enforce the husband's decree of absolute divorce in Virginia, should stand. In that case, the Court of Appeals held that the Virginia court did not have full jurisdiction of the parties and that *Haddock* v. *Haddock, supra,* made it necessary that Virginia be the last matrimonial domicile of the parties, or, if not, that the wife either voluntarily appear in the case or be personally served within the state. In reviewing that decision, this court held that the finding in the Virginia court that the husband was domiciled in that state for the required time was binding upon the wife in the District of Columbia because the wife appeared in the Virginia case under what purported to be a special appearance, challenging the jurisdiction of the Virginia court which appearance was, in effect, general in nature. Irrespective of the fact that the decision of this court lays great weight on the wife's appearance in the Virginia proceedings, this court, nevertheless, did use the following very significant language which entirely answers the contention of the petitioner in the case at bar:

> "Nor can it be said that the domicil was not adequate to support, in virtue of the rule of full faith and credit established by Congress, a decree enforceable in the courts of the District of Columbia. Depending on the connection in which used, various meanings have been attributed to the phrase matrimonial domicil. . . . Definition, inclusive and exclusive, is not to be found; it need not be attempted here. It is enough to say that care should always be taken to determine upon the facts and circumstances of each case whether, in accordance with the general rule, it is the domicil of the husband. . . . In this case, the wife has been adjudged by the decree *a mensa et thoro,* on which she relies, to have disrupted the marital relation. And by the decree of the Virginia court, the enforcement of which she opposes, she is adjudged to have persisted in desertion of petitioner for a period more than sufficient to entitle him under the laws of that State to dissolution of the bonds."

The court, therefore, expressly recognized that the important criterion is whether or not the place where the divorce

is obtained is the real domicile of the party obtaining it. The *Davis* case was distinguished by this court from the *Haddock* case on the ground that in the *Haddock* case the husband who obtained the foreign decree of divorce was the wrongdoer, whereas, in the *Davis* case, as in the case at bar, it has been established that the husband who obtained the decree of divorce was not the wrongdoer.

Fault as an Element of Divorce Jurisdiction, 37 Yale L. J., 564.
Beale, Haddock Reversed, 39 Harv. L. Rev., 417.
Beale, 50 Harv. L. Rev., 892.

Insofar as a finding of domicile is concerned, in the instant case the Court of Appeals expressly found that "the evidence and the findings clearly show that appellant did establish a new domicile in Florida."

The testimony upon which the cruelty of the wife was established in the Florida proceeding was received in evidence in the court below and amply supported the conclusion found by the Florida court that the husband was entitled to a divorce under the laws of that state on the ground of the cruelty of the petitioner. In *Kraskin* v. *Kraskin,* 70 App. D. C. 85, 104 F. (2d) 218, certiorari was denied by this court in 308 U. S. 568, where a similar question was presented after the *Davis* case was decided, in which the United States Court of Appeals for the District of Columbia held that the *Haddock* case applied to the *Kraskin* case because it there appeared that the husband who procured the foreign decree of divorce was the one at fault. It is, therefore, respectfully submitted that petitioner's contention, not based on any specific points, that the court below failed to properly apply any applicable decision of this court, is not supported by the decided cases in this court.

IV. Since Neither Petitioner Nor Respondent Was a Resident of or Domiciled in the District of Columbia, Separate Maintenance Was Properly Denied.

Title 14, Section 75 of the District of Columbia Code (1929) provides that the court shall have the power to grant separate maintenance on the application of the wife where the husband fails or refuses to maintain his wife although able to do so. The earlier cases in the District of Columbia decided by the court below involved cases where one of the parties to the maintenance action was a resident of the District of Columbia.

Tolman v. *Tolman,* 1 App. D. C. 299.
Rhodes v. *Rhodes,* 36 App. D. C. 261.

In the *Tolman* case the decision was based on the fact that it there appeared that "the husband *resides* here, and is therefore subject to the jurisdiction of the court." (Italics supplied)

Contrary to the statement of the public policy of the District of Columbia in maintenance actions, as presented by the petitioner in her brief, the only case in the District of Columbia where an action for maintenance was brought involving parties who were both non-residents of the District of Columbia, it was held that maintenance would not be granted.

Vertner v. *Vertner,* 63 App. D. C. 179, 70 F. (2d) 783.

After referring to the *Tolman* and *Rhodes* cases, the Court of Appeals said in the *Vertner* case, at page 180, that "In the present case both husband and wife are non-residents." It appeared, however, in that case that substituted service of process was had upon the non-resident husband and the case was disposed of on that ground without comment by the court as to what would have been the situation had the husband been served personally within the District of Columbia.

Public policy requires that a state, in which neither husband nor wife is resident or domiciled, should not entertain an action between them for the allowance of alimony or maintenance, separate from divorce.

Donnelly v. *Donnelly*, 39 Fla. 229, 22 So. 648.

It has been held that where neither spouse resides or is domiciled in the state where maintenance alone is sought, that state is without jurisdiction to entertain such action.

Keerl v. *Keerl*, 34 Md. 21.
Curtis v. *Curtis*, 200 Pa. 255, 49 A. 769.
Simon v. *Simon*, 73 Fla. 919, 75 So. 35.
Anderson v. *Anderson*, 140 Okla. 168, 282 P. 335.

In *Keerl* v. *Keerl, supra,* the question presented to the Court of Appeals of Maryland was whether alimony could be decreed by a court of equity where both husband and wife resided outside the state. It was held that the court had no jurisdiction to do so. It was observed that to adopt such a doctrine would result in confusion, vexation and possible injustice "for the wife might then institute a proceeding for alimony in every state where her husband might have property and have it decreed to her in each state" when the court of the domicile may have decreed a restitution of conjugal rights. The court there further said:

> It (referring to alimony) is an incident of the marriage and is a right entirely depending upon the status of the parties, and each state has the right to determine the status and condition of those who are domiciled within its limits. The courts of this state have therefore no jurisdiction to pass upon and determine the relative duties of a husband and wife, both of whom are residents of another state, and the Legislature never intended to confer such power by the passage of the act of 1777 nor by the adoption of the Code. To give jurisdiction to our courts, in such cases, one or other of the parties must be domiciled within the state." (Parentheses supplied)

In *Simon* v. *Simon, supra,* plaintiff alleged that she was a resident of New York and that her husband was likewise a resident of New York. In holding that Florida had no jurisdiction, the Supreme Court of Florida said:

> "As the appellee alleges that neither she nor the appellant is a resident of this state, she is not entitled to sue for alimony or maintenance in the courts of this state."

Even if public policy favors the opening of the courts of the District of Columbia to non-residents, that is, to cases where neither party lives in the District of Columbia nor is domiciled here, that policy should be confined to cases involving the inherent jurisdiction of equity to allow alimony, irrespective of divorce, only in those cases where resort to the local courts does not require as a condition precedent to the allowance of such maintenance, the declaration of the invalidity of a foreign decree of divorce.

To extend jurisdiction to cases of separate maintenance in actions between non-residents where a decree of divorce is set up as a defense, would require the court of the forum to pass upon the existence of jurisdiction over the marital res in a foreign jurisdiction where there is no pretense of the existence of any res in the jurisdiction of the forum. Alimony is an incident of divorce. The court possessed of jurisdiction over the marital res likewise possesses jurisdiction over the incidents of that res. Whatever disposition may have been made of such incident in the foreign jurisdiction, where the res was affected, would necessarily require the courts of the jurisdiction, where alimony alone is later sought, to interfere with the res, although it only pretends to affect an incident thereof, without any semblance of power over the res itself because of the non-residence of both parties.

The underlying concept of the cases involving the recognition or non-recognition of foreign decrees of divorce are cases arising in the courts of the matrimonial domicile upon the theory that a court without power has interfered with

the status which is within the power of the local court. The motivating factor for declaring a foreign decree of divorce invalid is that another jurisdiction has exercised power over a res which is located within the jurisdiction of the forum. All such cases of non-recognition of foreign divorces are fundamentally based upon the theory that the foreign court has invaded the province of the local court in purporting to affect a res over which the foreign court had no power to act but that it did act to the injury of a citizen of the state in a matter which was exclusively within the power of the local court.

In *Atkinson* v. *Atkinson*, 65 App. D. C. 241, this court said, at page 242:

> "Whether or not the operation of foreign decrees of divorce will contravene the policy of or do wrong or injury to the *citizens* of the state is to be determined by the courts of that state." (Italics supplied)

In declaring void the Florida decree in the case at bar, the trial court was exercising power over the alimony incident of the marital res by declaring that although the local courts were without in rem jurisdiction such also was the lack of jurisdiction in the Florida Court which had granted the divorce. In order to declare invalid the divorce granted to the respondent in Florida, such declaration of invalidity must be made by a court having some color of jurisdiction over the res and, until such jurisdiction is established, other courts are without power to declare the foreign decree void. Therefore, even assuming a power in the courts of the District of Columbia to decree separate maintenance under Title 14, Section 75, of the District of Columbia Code, such power does not impose a mandatory obligation upon the courts of the District of Columbia to exercise such power. The existence of such power, under the statute, in cases where both parties are non-residents, should not be exercised where to do so would necessitate the determination of the validity of a foreign decree of divorce. To challenge the exercise of power over a res by the courts of another

state some color of right to deal with that res should be shown to exist in the court in which recognition or non-recognition is sought. Accordingly, it was not necessary in the case at bar for the court below to decide whether it had the power to determine the validity of the Florida decree as between non-residents. It was sufficient, assuming such power to exist, for it to have held, as it did hold, "the public policy of the District of Columbia *does not require* its courts to take jurisdiction of a matrimonial dispute between two persons who are neither domiciled in the District nor even residents thereof." (Italics supplied)

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari in this case does not comply with the requirements of Rule 38 of this court; that no question of merit is presented in the petition which requires settlement by this court, nor is any error shown to have been committed by the court below. Therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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